ITT McDonnel and Miller, a Unit of Fluid Handling Division of International Telephone and Telegraph Corp. *and* Local 1234, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO. Case 13-CA-21670

26 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 12 August 1982 Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified.

The Administrative Law Judge dismissed the complaint's three allegations regarding the alleged threats of discharge and discipline and the discipline itself of employee Thomas Campbell. We agree.

We disagree, however, with the Administrative Law Judge's recommendation that the Board defer, under the *Collyer* doctrine,[2] two of the complaint allegations to the grievance-arbitration provisions of the parties' collective-bargaining agreement. Those portions of the complaint allege that Respondent violated Section 8(a)(5) of the Act by removing the grievances Campbell posted on union bulletin boards and thereby unilaterally modified article XIX, section 1, of the bargaining agreement; and that Respondent violated Section 8(a)(1) thereby interfering with protected activity. We find deferral inappropriate in this case.[3]

Respondent maintains three bulletin boards for use by the Union at its Chicago facility in accordance with the relevant provision in its current agreement with the Union:

> *ARTICLE XIX - MISCELLANEOUS PROVISIONS*
>
> Section 1. The Company will make available at convenient locations in the plant bulletin boards to be used by the Union for the purpose of posting Union notices. Nothing shall be posted thereon except notices and announcements relating to official International Union or Local Union business functions and social activities.

It is settled law that an employer violates its duty to bargain when it institutes changes in employment conditions without first consulting with the union. *NLRB v. Williamsburg Steel Products Co.*, 369 U.S. 736 (1962). Moreover, if such changes would modify the terms of an existing bargaining agreement, the employer is further obliged to obtain the union's consent to such changes. *C & S Industries*, 158 NLRB 454 (1966). In determining whether an employer's action unilaterally effects such a change, the Board has the authority to construe the contract and resolve inherent ambiguities.[4]

We have examined the language of article XIX, section 1, and find no basis for concluding that Respondent's action in this case modified that term of the contract. The contract clearly proscribes the use of bulletin boards for any purpose other than "notices and announcements relating to official International Union or Local Union business functions and social activities." Employee grievances do not fall within the plain meaning of the exception because they constitute a notice neither of union "business functions" nor of "social activities." Nor is there evidence based on the parties' prior enforcement of bulletin board policy that would sanction a more liberal interpretation of these terms than that commanded by their plain meaning. To the contrary, the Union has never attempted to use the bulletin boards in the past to post grievances—even though several prior con-

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] *Collyer Insulated Wire*, 192 NLRB 837 (1971).

[3] Member Jenkins' rejection of deferral is based on his longstanding opposition to the policy established by *Collyer* and its progeny. See *General American Transportation Corp.*, 228 NLRB 808 (1977). Member Zimmerman finds deferral precluded in this case, on the grounds that once the Board asserts jurisdiction, it must resolve all the issues in a given case. See *Sentle Trucking Corp.*, 260 NLRB 596 (1982); *Meharry Medical College*, 236 NLRB 1396, 1402, fn. 13 (1978).

Unlike his colleagues, Member Hunter would defer the allegations in the complaint relating to Respondent's prohibition of posting grievances to the grievance-arbitration procedures of the parties' collective-bargaining agreement.

[4] See *NLRB v. Roofing & Insulation Co.*, 393 U.S. 357 (1969); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967); *Dunham-Bush, Inc.*, 264 NLRB 1347 (1982); *E. I. Du Pont de Nemours & Co.*, 259 NLRB 1210 (1982); *Capital Parcel Delivery Co.*, 256 NLRB 302 (1981).

tracts contained the identical provision. We therefore find that the removal of grievances by Respondent did not repudiate article XIX, section 1, or in any way unilaterally modify the bargaining agreement in violation of Section 8(a)(5).[5]

Accordingly, we shall adopt the Administrative Law Judge's recommended Order to the extent that it recommends dismissal of the complaint but not subject to the qualification that the Board retain jurisdiction of allegations in paragraphs VIII(a) and XI and paragraphs X and XIII of the complaint. Rather, we shall order that the complaint be dismissed in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[5] Inasmuch as Respondent's actions in removing grievances from the bulletin board were consistent with the collective-bargaining agreement, it follows that the employees had no contractual right to post grievances. Accordingly, we shall also dismiss that allegation of the complaint alleging that Respondent's actions independently violated Sec. 8(a)(1) of the Act.

DECISION

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard on May 3, 1982, in Chicago, Illinois. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally modifying a provision of its collective-bargaining agreement with the Charging Party Union when it prohibited the posting of grievances on bulletin boards located on Respondent's premises. The complaint also alleges that Respondent violated Section 8(a)(1) of the Act by removing grievances posted on the bulletin boards and threatening disciplinary action for posting the grievances and that Respondent violated Section 8(a)(3) and (1) of the Act by actually suspending an employee for 1 day because he had posted grievances on bulletin boards in accordance with the contractual provision mentioned above. Respondent denied the substantive allegations of the complaint asserting that the contract provided no right to post grievances and that the entire matter should be deferred to arbitration since the collective-bargaining agreement calls for such a remedy to resolve disputes over contract interpretation. The parties submitted briefs.

Based on the entire record in this case, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Delaware corporation with a place of business located at 3500 North Spaulding, Chicago, Illinois, is engaged in the manufacture of heating and air-conditioning controls. During the past year, Respondent purchased and received at its Chicago, Illinois, facility, goods and materials valued in excess of $50,000 directly from points outside the State of Illinois. Accordingly, I find, as Respondent concedes, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Charging Party Union (hereafter the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE

A. *The Facts*

Since 1952 the Union has been recognized by Respondent as the collective-bargaining agent for the production and maintenance employees at its Spaulding Avenue facility. The current agreement is effective from December 6, 1981, through December 3, 1982. The agreement contains the following provision, which is the source of the present controversy:

> *ARTICLE XIX-MISCELLANEOUS PROVISIONS*
>
> Section 1. The Company will make available at convenient locations in the plant bulletin boards to be used by the Union for the purpose of posting Union notices. Nothing shall be posted thereon except notices and announcements relating to official International Union or Local Union business functions and social activities.

The clause has appeared in its present form in several prior contracts. The contract also contains grievance provisions resulting in arbitration for the resolution of questions of contract interpretation.

Respondent maintains three bulletin boards in the plant for use by the Union.

Thomas Campbell, a tool-and-die maker for Respondent for 3 years, is a member of the Union and also holds the position of Local vice president and committeeman.

On October 16, 1981, at or about 2 p.m., Campbell filed four separate grievances with the machine shop foreman, Roman Gzyl. Campbell had discussed two of the grievances with management officials before submitting them and the other two were discussed with management officials by employees for whom Campbell was filing the grievances.

At or about 2:30 p.m. the same day, during his afternoon break, Campbell posted the four grievances on both union bulletin boards in the main building. He did not post them on the third union bulletin board which was located in a separate building. The Union had never before attempted to post grievances on the bulletin boards.

Later, Campbell, who had resumed work, observed Production Manager Larry Kocen leave his office and approach the union bulletin board. Kocen removed one of the posted grievances. Campbell left his work station

and approached the bulletin board area. He protested Kocen's attempt to remove the grievances from the bulletin board. Kocen told Campbell he had been directed by Neal Bergman, Respondent's employee relations manager, to pull the grievances from the bulletin boards. Campbell then put his hand on two of the grievances in an attempt to prevent Kocen from removing them. Kocen continued his effort to remove the grievances, parts of which were ripped off the bulletin board. Campbell testified that he had hold of the grievances and Kocen "pulled them out of my hand, and he told me Tom if you don't get out of my way right now I'm going to fire you on the spot." Kocen testified that Campbell impeded his attempt to walk away from the bulletin board. Kocen's uncontradicted testimony is as follows:

> . . . So I attempted to walk around Tom and he took a step back and—in front of me, and I says Tom, please get out of my way, or I will have you fired.
>
> We went through another little dissertation again, and he was telling me again that I didn't have the right to pull down union documents from the union board. I tried to move around him again, and he got in front of me again. I says Tom please, if you don't get out, from in front of me, I'm going to have you fired.
>
> Shortly after this, I edged by—there was about a foot's space between the rag container and Tom. I slightly bumped him and I took off for the other union board upstairs.

No blows were struck but both Campbell and Kocen raised their voices during the incident.[1]

Later that same day, Campbell met with Bergman about the matter. Campbell insisted that the Union had a right to post the grievances under the contract. Bergman said that he viewed the contract clause differently and that the Union had no such right. He also told Campbell that after analyzing the contract he had instructed Kocen to remove the grievances. Campbell stated that he had a legal right to post the grievances. Bergman replied that if that was the case Campbell should bring him a copy of the law.

On October 21, 1981, Campbell was called into Manufacturing Manager Joe Gaughan's office. Gaughan told him, in the presence of another union official and others, that Respondent was looking into the matter to see if he would be disciplined. Campbell asked that Respondent inform him of its decision.

Two days later Campbell was again called into Gaughan's office and questioned about the entire incident. The same union official was also present at this meeting. Gaughan asked Campbell if he had tried to take the grievances out of Kocen's hand, if he pushed Kocen out of the way, and whether he tried to block the aisle so that Kocen could not get by. Campbell described his actions and denied pushing Kocen or blocking the aisle. Gaughan also asked Campbell why he had posted the grievances. Campbell stated that there was a volatile situation in the shop and that the Union had to demonstrate it was attempting to resolve the situation.

On October 26, 1981, Campbell was again called into Gaughan's office. At this point, Campbell was advised that he was being given a 1-day suspension. Campbell apologized for raising his voice to Kocen but stated that there were "extenuating circumstances" and that it would not happen again. The "warning slip" issued to Campbell at this time read as follows:

> On 10-16-81 you violated Plant Rules #11, 27 [and] 28 by failing to obey an order of the Production Manager, interfering with management and distracting the attention of others by unnecessary shouting or demonstrations in the plant. You are hereby given a one day layoff, 10-27-81. Continued violations of Plant Rules will result in further disciplinary action and or your discharge.

Respondent's rule provides for disciplinary action for violation of the following conduct:

> 11. Refusal to obey orders of Foreman or other supervision.
>
> 27. Threatening, intimidating, coercing or interfering with employees or supervision at any time.
>
> 28. Distracting the attention of others, or causing confusion by unnecessary shouting or demonstrations in the plant.

The Union filed a grievance over Campbell's suspension and the removal of the grievances from the bulletin boards. The two grievances were processed through the third step of the contractual grievance procedure. On November 9, 1981, Respondent and the Union filed a joint request for arbitration panels to resolve the two grievances. On December 3, 1981, after charges were filed in the instant case, the Union withdrew its request for arbitration of the two grievances and decided to submit the matters to the processes of the Labor Board.

B. *Discussion and Analysis*

The complaint focuses on two distinct aspects of Respondent's conduct. The first is the removal of the grievances posted by Campbell. The second is the threat to and discipline of Campbell allegedly for his having posted the grievances. I shall consider each of these separately.

1. The removal of grievances posted by employee Campbell on Respondent's bulletin boards

The General Counsel alleges that Respondent's removal of grievances posted by employee Campbell on its bulletin boards violated the Act in two respects: paragraphs X and XIII allege a unilateral change of existing practice in violation of Section 8(a)(5) and paragraphs VIII(a) and XI allege interference with protected activity in violation of Section 8(a)(1). Both allegations actually in-

[1] The accounts of Campbell and Kocen are not inconsistent although they emphasize different aspects of their confrontation. I note particularly that Kocen's account of Campbell's blocking his exit from the bulletin board area, the incident which precipitated the threat, is more detailed than Campbell's.

volve the same conduct. I find that both allegations should be deferred to the grievance-arbitration provisions of the collective-bargaining agreement of the parties.

Paragraphs X and XIII of the complaint allege that Respondent "unilaterally" modified article XIX of the collective-bargaining agreement in violation of Section 8(a)(5) and (1) of the Act by "prohibiting the posting of grievances on bulletin boards." This allegation calls for an interpretation of the contract which the parties have left to the grievance-arbitration provisions of the very contract whose terms are in dispute. The Board has held that it will defer to contractual grievance and arbitration provisions in such cases provided that there exists no hostility or animus toward the union or the employees' protected concerted activities. In *General American Transportation Corp.*, 228 NLRB 808 (1977), the Board held, with then Chairman Murphy's concurring opinion dispositive, that cases involving allegations of Section 8(a)(1) and (3) and 8(b)(1)(A) and (2) may not be deferred for the decision of an arbitrator under the judicially approved *Collyer* doctrine.[2] In a companion case, *Roy Robinson Chevrolet*, 228 NLRB 828 (1977), the Board, again with then Chairman Murphy's opinion dispositive, approved deferral in cases involving allegations of Section 8(a)(5) and Section 8(b)(3) of the Act unless there was evidence of intent to encourage or discourage union activities or to otherwise interfere with employee rights under Section 7 of the Act. See 228 NLRB at 811 and 228 NLRB at 831. Murphy's rationale for the distinction was based on the notion that the latter types of cases essentially call for contract interpretation which is uniquely within the province of an arbitrator. She also stated that, although the former types of cases may "arguably also [involve] a contract violation, the determinative issue is not whether the conduct is permitted by the contract, but whether the conduct was unlawfully motivated or whether it otherwise interfered with, restrained, or coerced employees in the exercise of" Section 7 rights. *General American Transportation, supra*, 228 NLRB at 811.

It is clear that the issue of whether Respondent's refusal to permit the posting of grievances constitutes a unilateral change of existing contractual working conditions turns upon an interpretation of the contract. Kocen removed the grievances posted by Campbell at the behest of Bergman who decided that the Union had no right under the contract to post grievances on the bulletin boards. This issue is one which properly may be deferred to an arbitrator. If the arbitrator finds that the Union's interpretation of the contract is correct then the Union will have the right to post grievances; if the arbitrator rules in favor of Respondent's position, there will be no such right. The arbitrator's decision will resolve the issue without the need for Board intervention.

The General Counsel contends that the Board's decision in *Precision Anodizing & Plating*, 244 NLRB 846 (1979), requires the Board to reach the merits of the instant case and indeed to find a violation. I disagree. In *Precision Anodizing*, the Board refused to defer to a grievance-arbitration procedure. Then Chairman Fanning and Member Jenkins relied "on their longstanding opposition to deferral of statutory issues to any systems of private decision making." Member Truesdale agreed that deferral was inappropriate because the employer's conduct "revealed such hostility . . . to the Union and to the contract as to preclude a finding that the parties' grievances and arbitration machinery can reasonably be relied on to function properly and to resolve the current issues fairly." Member Truesdale's position thus conforms closely to then Chairman Murphy's position. Under existing Board precedent, the views of then Chairman Fanning and Member Jenkins represent a minority position. The majority position, which was expressed by then Chairman Murphy and which has not been overruled, is that the Board will defer in cases where the complaint alleges a violation of Section 8(a)(5) of the Act, provided that the employer's conduct reveals no hostility or animus toward the employees' union or protected concerted activities.

In *Precision Anodizing*, the Board found that the employer "summarily rejected" four grievances submitted by union business agents, imposed new conditions on access, and, indeed, denied plant access to union representatives, all in violation of the Act. It is clear that such conduct not only provided a background to the employer's unilateral change of conditions of employment but also provided evidence of hostility toward the union and the contract which, as Member Truesdale stated, "was contrary to the principles of deferral."

No such evidence of hostility exists in this case. The Union was able to, and did, present the grievances it sought to post to management officials. Indeed, the grievances were discussed with management officials. There was no evidence of hostility toward the Union, the filing of grievances or the contract itself. Respondent simply relied on its view of the contract when it removed the grievances from the bulletin board. Accordingly, *Precision Anodizing* is distinguishable from the instant case and does not require nondeferral.[3]

In paragraphs VIII(a) and XI of the complaint, the General Counsel alleges that the removal of the grievances by Respondent constitutes an independent violation of Section 8(a)(1) of the Act. Although this allegation covers the same conduct which allegedly constitutes the unilateral change discussed above, the General Counsel casts the conduct in a different light. He asserts that Campbell had a protected right to post grievances under article XIX of the collective-bargaining agreement and thus alleges that a violation is established under the following principle spelled out by the Board in *Container Corp. of America*, 244 NLRB 318, fn. 2 (1979):

> The Administrative Law Judge recognized in his Decision in [sic] that "the use of an employer's bulletin board by a union for union purposes is not generally a protected activity under the Act." Nev-

[2] *Collyer Insulated Wire*, 192 NLRB 837 (1971).

[3] Nor is there evidence of hostility toward union or protected rights in the threats to and discipline of Campbell considered in this decision, *infra*. Respondent's conduct in this respect was in response to Campbell's attempt to prevent a management representative from removing the grievances posted by Campbell and did not unlawfully interfere with protected rights.

ertheless, the Administrative Law Judge found that the Union had a "statutory" right to post its newsletter on the Employer's bulletin board. While we agree with the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) of the Act by discriminatorily removing the Union's newsletter from the bulletin board and by threatening employee and Union Vice President Billy Young with disciplinary action for any reposting of the newsletter, we do not agree with his characterization of the Union's right to post the newsletter as a "statutory" right. It is well established that there is no statutory right of employees or a union to use an employer's bulletin board. However, it is also well established that when an employer permits, by formal rule or otherwise, employees and a union to post personal and official union notices on its bulletin boards, the employees' and union's right to use the bulletin board receives the protection of the Act to the extent that the employer may not remove notices, or discriminate against an employee who posts notices, which meet the employer's rule or standard but which the employer finds distasteful. See *Group One Broadcasting Co., West*, 222 NLRB 993 (1976); *Nugent Service, Inc.*, 207 NLRB 158 (1973); *Tempco Mfg. Co., Inc.*, 177 NLRB 336 (1969); *Challenge Cook Brothers of Ohio, Inc.*, 153 NLRB 92 (1965).

Under the *Container* decision and the cases cited therein, it appears that in certain circumstances an employer commits an unfair labor practice if he removes notices from his bulletin boards where the notices meet the employer's "rule or standard." However, the only evidence relied on by the General Counsel to show that the grievances in this case met Respondent's rule or standard is his view that article XIX of the collective-bargaining agreement permits the posting of grievances. Thus, the General Counsel alleges that grievances are "notices or announcements" of union "business functions" within the meaning of article XIX, again presenting the issue of whether this interpretation of the contract ought to be made by the Board or an arbitrator.

Applying then Chairman Murphy's position as stated in the *General American Transportation* and *Roy Robinson* cases to the precise theory advanced by the General Counsel, I believe this issue, like the unilateral change issue, should be deferred to the contract grievance-arbitration provisions of the contract of the parties. As emphasized by the Board in the *Container* case on which the General Counsel relies, the right which the Board protects in bulletin board posting cases is one that derives not from the statute but from the employer's rule. Where, as here, the rule is embodied in a collective-bargaining agreement, the "determinative issue," to paraphrase then Chairman Murphy's pivotal decision in *General American Transportation*, is whether "the conduct is permitted by the contract," the very issue she would have permitted an arbitrator to resolve. Thus, in this unique set of circumstances, where the alleged protected activity derives not from the statute but from the contract, to adhere to a distinction in the policy of deferral between Section 8(a)(5) cases and Section 8(a)(1) cases—as the General Counsel alleges—seems mechanically to exalt form over substance. The thrust of then Chairman Murphy's position is that the Board should defer where the determinative issue requires an interpretation of the contract and there is no hostility toward the union or clearly recognized statutory rights.

Since the right of employees or the Union to post the grievances is created, if at all, by reference to the contract, it seems reasonable to look to the interpreter of the contract to determine whether such a right exists. Any other resolution seems destined to confuse contract rights with statutory rights. For example, in his brief, the General Counsel urges that, a right to post grievances exists even though grievances were never posted under article XIX of the contract, because there was no evidence that the Union expressly waived its right to do so. The requirement of a clear and unmistakable waiver of statutory rights is a common theme in Labor Board cases.[4] However, if, as the Board stated in *Container*, the right to use bulletin boards on an employer's premises is not a statutory right, and if, as the General Counsel alleges, the right herein is derived from contract, it is incongruous to place any significance on the lack of evidence that one party waived a right whose very existence is at issue. Indeed, an arbitrator might well reach the conclusion that the contract language together with the lack of any evidence concerning the intent of the parties and the failure to post grievances in the past means that such a right does not exist under the contract.[5]

The Board's *Container* decision does not, as the General Counsel seems to suggest, require nondeferral. The Board did refuse to defer in that case. However, the facts are clearly distinguishable from those presented here. In that case, it was alleged that the employer violated Section 8(a)(1) and interfered with protected rights when it removed a "newsletter" posted on its bulletin board contrary to an existing contract provision. The Administrative Law Judge, whose findings on this point were adopted by the Board, rejected the employer's contention that its removal of the "newsletter," signed by union officials and critical of the employer's handling of grievances, was simply a "breach of contract." The evidence showed that the employer permitted all kinds of notices to be posted, including those involving personal matters as well as union business matters. The employer's only objection to the newsletter was its allegedly slanderous and inflammatory contents. Thus, the employer's "rule or standard" established a right to post and the Board could properly find, as it did, that the employer discriminatorily removed only documents it found "distasteful."

[4] See, e.g., *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964).

[5] The General Counsel's reliance on the waiver analysis of the Administrative Law Judge in *Precision Anodizing* is unavailing. First of all, that case involved the issue of unilateral change of existing conditions, an issue which the Board properly reached because of the employer's hostility toward the union and the contract, a circumstance not present here. Secondly, the Administrative Law Judge's waiver analysis was unnecessary to his finding on the merits that the employer unilaterally changed existing practices.

Here, on the other hand, there is no way to measure Respondent's "rule or standard" except by reference to the contract. No evidence was submitted to show Respondent's practice except that the parties agreed that grievances had never before been posted, a circumstance which would suggest that Respondent's rule or standard did not permit the posting of grievances.

In addition, here, unlike in the *Container* case, there was no evidence of discrimination or hostility toward the Union or against the filing of grievances. In *Container*, in contrast, the Board found that the employer made threats against employees and union officials for filing grievances. Moreover, in *Container*, the employer objected to the union's newsletter because it criticized the employer's handling of grievances filed by the union.

Finally, this issue is particularly well suited for deferral. Since the parties are free to negotiate changes in the contract language and thus in the very right which allegedly has been breached, this aspect of the case has no impact on employee rights beyond those which are created in the bargaining unit and under the particular contract involved herein. Indeed, since the contract expires in a few months, it is likely that the parties will address the issue in negotiations and resolve their differences. In short, I perceive no significant statutory interests which will be undermined by the Board's deferral of this issue.

In these circumstances, I shall recommend that the complaint allegations embodied in paragraphs X and XIII and VIII(a) and XI be deferred to the grievance arbitration provisions of the contract of the parties for resolution.

2. The alleged threats of discharge and discipline and the discipline itself of employee Campbell

The General Counsel also contends that Respondent committed three other violations of the Act. Paragraphs VIII(b) and (c) and XI of the complaint allege that Respondent violated Section 8(a)(1) of the Act by virtue of the following: the threat by Kocen that Campbell would be discharged if he "posted grievances" pursuant to article XIX of the collective-bargaining agreement; and the threat by Neal Bergman, "on or about October 21, 1981" of "possible future disciplinary action" if Campbell posted grievances. Paragraphs IX and XII of the complaint allege that Respondent violated Section 8(a)(3) and (1) of the Act by suspending Campbell because "he joined, supported, or assisted the Union" and engaged in protected concerted activity, including the posting of grievances pursuant to article XIX of the contract, and in order to discourage other employees from engaging in such activities.

In order to decide this aspect of the case, it is necessary to analyze the nature and extent of the protected right to post grievances which is asserted by the General Counsel. The General Counsel has asserted that the right exists by virtue of the language of the collective-bargaining agreement under the theory set forth in the *Container* case. My reading of the *Container* case, as well as the cases cited by the Board in *Container*, convinces me that the touchstone of the violation in these cases is the employer's discriminatory treatment of attempts to use bulletin boards on an employer's premises for union messages. No such discrimination exists in this case.

The General Counsel has not argued that Campbell's right to post grievances is based on the *Interboro* doctrine which recognizes the right, under Section 7 of the Act, of employees to enforce a collective-bargaining agreement. *Interboro Contractors*, 157 NLRB 1295, 1298–99 (1966), enfd. 388 F.2d 495 (2d. Cir. 1967). The rationale for this doctrine is that even individual employees make common cause with their fellow employees when enforcing the very epitome of collective rights, the collectively negotiated bargaining agreement. Such a right exists whether or not the employee's interpretation of the contract was correct, and an employer violates Section 8(a)(1) of the Act by punishing an employee for asserting such right. See *NLRB v. Ben Pekin Co.*, 452 F.2d 205, 206 (7th Cir. 1971), and *Interboro, supra*, 157 NLRB at 1298, fn. 7. It is also recognized that an employee loses the protection of the Act if his conduct is not related to the enforcement of a contract right or is unreasonable in the circumstances. See *Ben Pekin, supra*, 452 F.2d at 206–207. "The employee's right to engage in concerted activity may permit some leeway for impulsive behavior" but it must be "balanced against the employer's right to maintain order and respect." *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965).

The *Interboro* doctrine is encompassed by the complaint allegation that Campbell was asserting a protected right by posting grievances "pursuant to" the contract and it is more applicable to the facts of this case than is the *Container* doctrine. I am therefore called on to balance the alleged protected activity against Respondent's right to discipline for misconduct. The questions to be resolved here are whether Campbell's conduct, which precipitated the threats and discipline, was reasonably related to the enforcement of a contract right and whether that conduct itself was reasonable. I find that Campbell's conduct was neither reasonably related to the assertion of a contract right nor reasonable in the circumstances. Campbell's conduct was thus unprotected and Respondent's threats and discipline did not unlawfully interfere with or discriminate against Campbell for exercising protected statutory rights.

First of all, Kocen's threat and the discipline of Campbell were not addressed to Campbell's having posted the grievances, conduct which, in and of itself, might be viewed as closely related to the assertion of a contract right. The threats and discipline were addressed to Campbell's interference with Kocen's attempt to remove the grievances. In this context, there was absolutely no evidence that Respondent exhibited union animus or any hostility toward the filing of grievances or the collective-bargaining process.

Kocen's threat to fire Campbell was made spontaneously when Campbell blocked Kocen from leaving the bulletin board area with the grievances he had removed. Campbell blocked Kocen's path by stepping in front of him two times. He had also taken the grievances from Kocen thus requiring Kocen to "pull them out of [Campbell's] hand." Campbell's blocking of Kocen's path was so attenuated from his alleged exercise of a contract

right or the posting of grievances as to render his conduct unprotected. Thus, Kocen's remarks cannot be construed as a threat to discharge Campbell for enforcing a contract right or for posting grievances in accordance with a perceived contract right.

Nor has the General Counsel demonstrated that Respondent's 1-day suspension of Campbell was improper. The evidence shows that Campbell left his work station, approached Kocen, and interfered with Kocen's removal of the grievances. Campbell fought with Kocen over the grievances and physically blocked Kocen's exit from the bulletin board area. The confrontation was brief. However, the danger in sanctioning Campbell's conduct would be to approve the substitution of physical force and intimidation for the peaceful resolution of contractual disputes. Although an employee may take reasonable steps to enforce his view of a collective-bargaining agreement, such steps do not include physical confrontations. Campbell was not content with simply arguing with Kocen that his interpretation of the contract was correct or complaining about the action taken by Kocen. He physically interfered with Kocen's removal of the grievances. Campbell's conduct was thus beyond the ambit of reasonableness and cost him the protection of the Act.[6]

In these circumstances, I shall dismiss the complaint allegations in paragraphs VIII(b) and (c), IX, XI, and XII.

CONCLUSIONS OF LAW

1. The issues presented by complaint allegations in paragraphs X and XIII and in paragraphs VIII(a) and XI may and appropriately should be deferred for resolution under the grievance-arbitration provisions of the contract of the parties. Accordingly, such complaint allegations are dismissed subject to the qualifications contained in the recommended Order set forth below.[7]

2. The complaint allegations in paragraphs VIII(b) and (c), IX, XI, and XII have not been proved by a preponderance of the evidence and are therefore dismissed.

[Recommended Order omitted from publication.]

[6] The remaining 8(a)(1) allegation fails for another reason. There was no evidence at all of a threat by Bergman "on or about October 21" against Campbell. It is true that at an October 21 meeting between Campbell and other union and management officials, Manufacturing Manager Joe Gaughan stated that Respondent was investigating and considering whether to discipline Campbell for his actions of the previous Friday in attempting to stop Kocen from removing the grievances he had posted. No attempt was made to amend the complaint allegation to implicate Gaughan instead of Bergman or to change the date to refer to some other statement of Bergman. The General Counsel has not briefed this issue and I assume it has been dropped or withdrawn. In any event, I see no threat of reprisal against protected statutory rights in Gaughan's remarks of October 21. He simply stated the obvious, that Respondent was investigating the events of the previous Friday to determine whether disciplinary action would or should be taken and Campbell's conduct was itself unprotected.

[7] As indicated earlier, two grievances were filed and later withdrawn in order to pursue Board remedies: one dealing with the removal of grievances from the bulletin boards and the other dealing with the suspension of Campbell. The deferral order involves only that which deals with the removal of grievances. Of course, the deferral order assumes that Respondent will not object to the processing of that grievance. See *Roy Robinson, supra*, 228 NLRB at 832.